

APPEAL NO. 172971
FILED FEBRUARY 5, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 10, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on April 7, 2017; (2) the claimant's impairment rating (IR) is nine percent; and (3) the claimant did not have disability from January 4 through April 27, 2017, resulting from the (date of injury), compensable injury. The claimant appealed the ALJ's determinations. The respondent (self-insured) responded, urging affirmance of the ALJ's determinations.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), in the form of a left shoulder rotator cuff tear, bilateral knee sprain, and low back sprain, and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. W) as the designated doctor on the issues of MMI, IR, and disability. The claimant testified she was injured when placing boxes on a shelf.

TIMELINESS OF CLAIMANT'S APPEAL

The self-insured contends that the claimant did not timely file her appeal.

Section 410.202(a) provides that to appeal the decision of an ALJ, a party shall file a written request for appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the ALJ is received from the Division and shall on the same date serve a copy of the request for appeal on the other party. Section 410.202(d) provides that Saturdays and Sundays and holidays listed in Texas Government Code Section 662.003 are not included in the computation of the time in which to file an appeal or a response. 28 TEX. ADMIN. CODE § 143.3(d) (Rule 143.3(d)), effective December 13, 2009, provides that a request for review shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of deemed receipt of the ALJ's decision; and (2) received by the Division not later than the 20th day after the date of deemed receipt of the ALJ's decision. The Appeals Panel has held that both portions of Rule 143.3(d) must be complied with for an appeal to be timely. Appeals Panel Decision (APD) 042688, decided December 1, 2004.

Records of the Division reflect that the ALJ's decision was mailed to the claimant at her correct address on October 24, 2017. Pursuant to Rule 102.5(d), unless the great weight of the evidence indicates otherwise, the claimant was deemed to have received the ALJ's decision 5 days later. The 5th day after October 24, 2017, was Sunday, October 29, 2017, so pursuant to Rule 102.3(a)(3) the deemed date of receipt of the ALJ's decision is the next working day, which is Monday, October 30, 2017. With the deemed date of receipt of the ALJ's decision on October 30, 2017, in accordance with Section 410.202, excluding Saturdays and Sundays and holidays listed in Texas Government Code Section 662.003, the appeal had to be filed or mailed no later than Monday, November 20, 2017.

The claimant's request for review is dated December 7, 2017, and was sent to and received by the Division by facsimile on December 11, 2017. The evidence established that the claimant at the time of the CCH and as of the date of her request for review lived in (city), Texas, a city in Harris County.

The Governor of the State of Texas issued a disaster proclamation on August 23, 2017, certifying that Hurricane Harvey posed a threat of imminent disaster to a number of counties in Texas, including Harris County. On August 29, 2017, the Commissioner of Workers' Compensation issued Commissioner's Bulletin # B-0020-17, which provides, in part:

For system participants who reside in the counties listed in the Governor's disaster proclamation, the Texas workers' compensation deadlines for the following procedures are tolled through the duration of the Governor's disaster proclamation:

- Medical and income benefit dispute deadlines.

The Governor's disaster proclamation and Commissioner's Bulletin # B-0020-17 were both in effect on November 20, 2017 (when the appeal would otherwise have been due), on December 11, 2017 (when the claimant's appeal was filed), and at all times in between. Because the claimant is a resident of a county listed in the Governor's disaster proclamation, the appeal deadlines in this case were tolled during the periods at issue. Accordingly, the claimant's appeal is timely and the Appeals Panel has jurisdiction to consider it.

MMI/IR

The ALJ's determination that the claimant reached MMI on April 7, 2017, is supported by sufficient evidence and is affirmed.

The ALJ's determination that the claimant's IR is nine percent is supported by sufficient evidence and is affirmed.

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Section 401.011(16). The claimant has the burden to prove that she had disability as defined by Section 401.011(16). Disability is a question of fact to be determined by the ALJ. See APD 042097, decided October 18, 2004. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. APD 041116, decided July 2, 2004. The claimant need not prove that the compensable injury was the sole cause of her disability; only that it was a producing cause. APD 042097, *supra*.

It is undisputed that the claimant underwent a left distal clavicle resection on January 4, 2017, for the compensable injury.

Dr. W was appointed to determine whether the claimant's inability to obtain and retain employment at wages equivalent to the pre-injury wage from January 4 to April 27, 2017, was a direct result of the compensable injury. Dr. W examined the claimant on August 2, 2017, and opined in her accompanying narrative report that:

According to the [Medical Disability Advisor, Workplace Guidelines for Disability Duration (MDG), excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd.] recommendations for return to work, [the claimant] would have been off work from [January 4, 2017] to [January 25, 2017]. She would have been able to return to sedentary work on [January 26, 2017] and light duty on [February 15, 2017].

The answer to the question [whether the claimant's inability to obtain and retain employment at wages equivalent to the pre-injury wage from January 4 to April 27, 2017, was a direct result of the compensable injury] is no. From [January 4 to April 27, 2017], the [claimant's] inability to obtain and retain employment at wages equivalent to the pre-injury wage was not a direct result of the compensable injury. She should have been able to return to sedentary duty [on January 26, 2017] and progressed forward.

Dr. W's narrative report contains conflicting opinions regarding disability. Although Dr. W stated that the claimant's inability to obtain and retain employment at wages equivalent to the pre-injury wage from January 4 to April 27, 2017, was not a

direct result of the compensable injury, she noted that for surgical treatment of the claimant's shoulder the MDG provides that a sedentary job classification results in a maximum of 21 days of disability and a light duty job classification results in a maximum of 42 days of disability. Dr. W further stated that the claimant should have been able to return to sedentary duty on January 26, 2017, and light duty on February 15, 2017, after the January 4, 2017, surgery.

In evidence are Work Status Reports (DWC-73) dated January 13, 2017, and February 10, 2017, from (Dr. M), the claimant's treating doctor, taking the claimant off of work beginning January 4 through March 10, 2017, due to the January 4, 2017, surgery. Also in evidence is a letter from Dr. M dated March 10, 2017, in which he references the claimant's left shoulder distal clavicle procedure on January 4, 2017, and recommended one more month of therapy. Dr. M also stated that he planned to release the claimant to full duty status on follow-up "around mid April." The claimant testified at the CCH that she was unable to work during the disability period in dispute due to the January 4, 2017, surgery.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

The ALJ's determination that the claimant did not have disability beginning on January 4, 2017, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse that portion of the ALJ's determination that the claimant did not have disability beginning on January 4, 2017, and we render a new decision that the claimant had disability beginning on January 4, 2017.

Based on the evidence presented there are different dates on which the claimant's disability could have ended; therefore, we do not find it appropriate to render a decision as to when the claimant's disability ended. Accordingly, we reverse that portion of the ALJ's determination that the claimant did not have disability from January 5 through April 27, 2017, and we remand the issue for the ALJ to make a determination of the end date of the claimant's disability during the period at issue that is supported by the evidence.

SUMMARY

We affirm the ALJ's determination that the claimant reached MMI on April 7, 2017.

We affirm the ALJ's determination that the claimant's IR is nine percent.

We reverse that portion of the ALJ's determination that the claimant did not have disability beginning on January 4, 2017, and we render a new decision that the claimant had disability beginning on January 4, 2017.

We reverse that portion of the ALJ's determination that the claimant did not have disability from January 5 through April 27, 2017, and we remand the issue for the ALJ to make a determination of the end date of the claimant's disability during the period at issue that is supported by the evidence.

REMAND INSTRUCTIONS

On remand the ALJ is to consider the evidence and make a determination on the end date of the claimant's disability during the period at issue. No new evidence should be admitted at the CCH on remand.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **CITY OF HOUSTON (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**ANNA RUSSELL – CITY SECRETARY
900 BAGBY
HOUSTON, TEXAS 77002.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge